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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF
WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

BRIEF FOR APPELLANT

ROBERT H. QUINN
Attorney General of the
Commonwealth of Massachusetts
Attorney for Appellant
State House
Boston, Massachusetts 02133
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
DAVID A. MILLS
Assistant Attorney General
Chief, Criminal Appellate Section
CHARLES E. CHASE
Assistant Attorney General

WILLIAM T. BUCKLEY
District Attorney
Middle District
Commonwealth of Massachusetts

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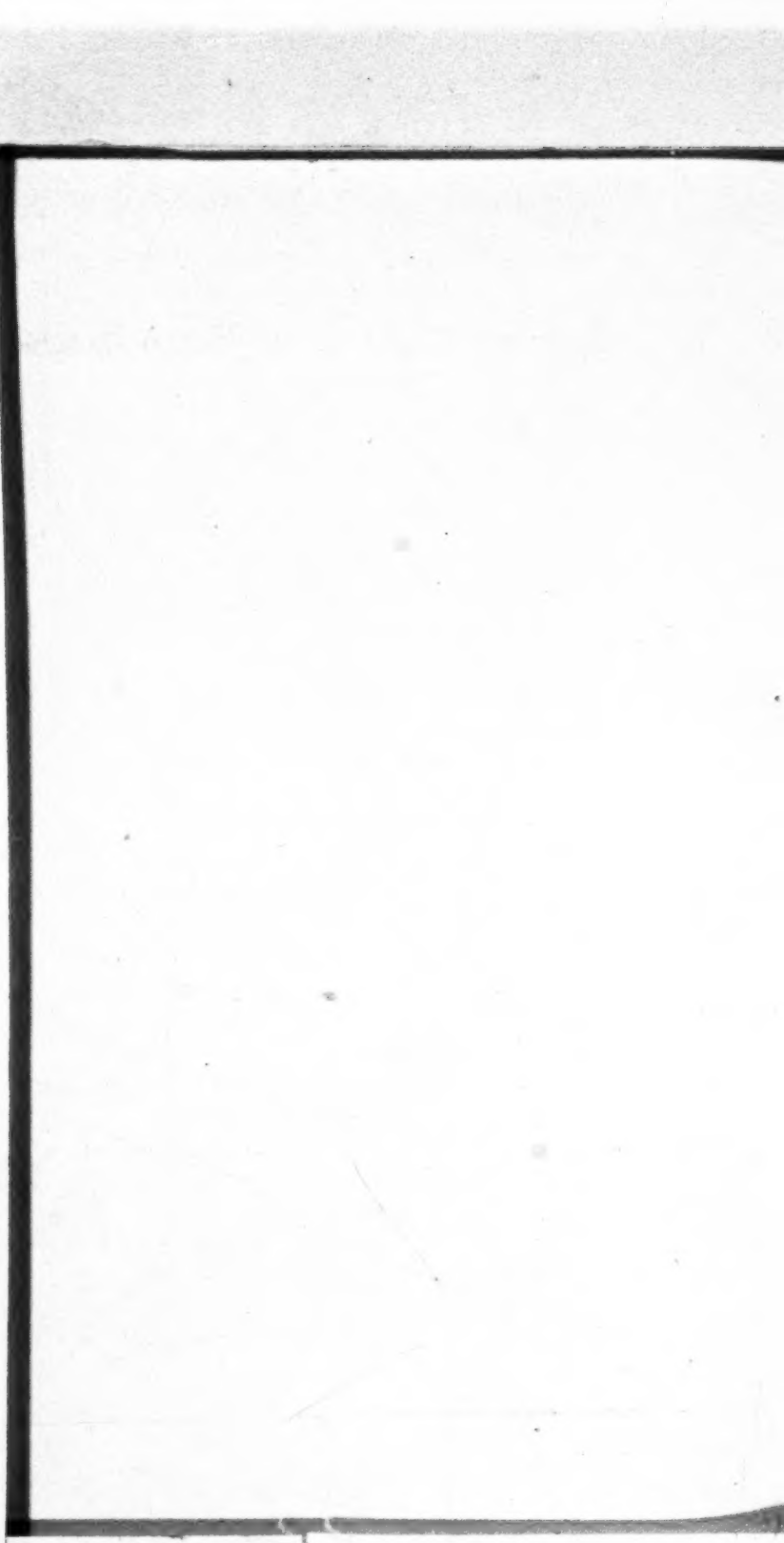

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BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals is reported at 471 F.2d 88 and is reproduced in the Jurisdictional Statement commencing at page 21. The opinion of the United States District Court is reported at 343 F. Supp. 161 and can be found in the Appendix commencing at page 47. The opinion of the Supreme Judicial Court of Massachusetts is reported at 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 and can be found commencing at page 37 of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The judgment of the Court of Appeals was entered on December 14, 1972. A timely notice of appeal was filed on January 29, 1973, and the appeal was docketed in this Court on March 14, 1973. On May 21, 1973, probable jurisdiction was noted.

Question Presented

Whether the Court of Appeals erred in finding Mass. Gen. Laws, ch. 264 §5, on its face, to be impermissibly vague in violation of the Fourteenth Amendment and overbroad in violation of the First Amendment?

Constitutional Provisions

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

At the time of the offense charged in this case, Massachusetts General Laws, Chapter 265 Section 5, read:

§5. Flag; penalty for misuse.

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a respresentation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag. Notwithstanding the foregoing, there may be attached to the staff bearing a flag of the United States or of Mas-

sachusetts belonging to an organization of veterans of the Civil War, to a camp of the United Spanish War Veterans, to a post or department of The American Legion, or to a post or department of the Veterans of Foreign Wars of the United States, or to a post or department of the Jewish War Veterans of the United States, or to a camp or department of the Sons of Union Veterans of the Civil War, or to a barracks or department of the Veterans of World War I of the U. S. A., or belonging to or used in the service of the United States or the commonwealth, a streamer having inscribed thereon the names of battle and the name and number of the organization to which such flag belongs. For the purposes of this section, a flag shall be deemed to continue to belong to any organization of veterans hereinbefore specified, although such organization has ceased to exist, during such time as it remains in the lawful ownership or custody of any other of the aforesaid organizations or of the commonwealth or of any political subdivision thereof, or of any patriotic or historical society incorporated under the laws of the commonwealth or determined by the adjutant general to be a proper custodian thereof."

Title 28, United States Code, Section 2254(b), which provides:

"An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Statement

A criminal complaint was brought against the appellee, Valarie Goguen, in the District Court of Leominster, Massachusetts, on January 31, 1970, which charged that he did publicly treat contemptuously the flag of the United States in violation of Mass. Gen. Laws, ch. 264 §5 (App. 4-5). After trial and conviction in the District Court, appellee made a timely appeal for a trial *de novo* in the Worcester County Superior Court (App. 1).

The relevant evidence presented during the Superior Court jury trial was as follows: On January 30, 1970, a Leominster police officer observed the appellee standing with a group of persons on Main Street in Leominster. Appellee was seen to have a cloth American flag, approximately 3 x 5 or 4 x 6 inches sewn to his pants in the vicinity of the left portion of his buttocks. The police officer questioned the appellee about the flag and during this questioning he observed that the other people present were laughing (App. 2-3).

On the same day, another Leominster police officer observed the appellee walking in the downtown business district of Leominster with an American flag sewn onto his pants in the area of his buttocks (App. 3).

The jury returned a verdict of guilty and the appellee received a sentence of six months in the House of Correction (App. 2). On appeal, the Supreme Judicial Court of Massachusetts affirmed the conviction in a rescript opinion. *Commonwealth* v. *Goguen*, 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 (1972), (App. 37).

On February 23, 1972, appellee filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. By agreement, the parties presented to the District Court the record and briefs that were before the Supreme Judicial Court; no other evidence was offered (App. 39-40, 45-46). Judgment grant-

ing the writ of habeas corpus was entered on June 13, 1972. The Commonwealth appealed (App. 58-59).

On December 14, 1972, the Court of Appeals for the First Circuit, having found the Massachusetts flag statute to be both facially vague and overbroad, affirmed the judgment of the District Court (App. 61, Jur. St. 49). A timely notice of appeal was filed on January 29, 1973 (App. 60, 62).

The appeal was docketed in this Court on March 14, 1973; probable jurisdiction was noted on May 21, 1973.

Summary of Argument

I.

A. In presenting his case to the Supreme Judicial Court of Massachusetts, appellee made only an allegation that ch. 264 §5 was impermissibly vague on its face. This bare allegation was never developed in terms of whether the statute gives adequate notice, on its face, of what conduct it proscribes. Since a facial vagueness argument was not made, the state court opinion did not address itself to that issue. The opinion of the state court is in obvious harmony with its rule that issues not *argued* in briefs need not be considered.

B. The First Circuit Court of Appeals erred in analyzing this case in terms of a facial vagueness claim. An examination of the state court record and opinion clearly shows that appellee failed to argue such a claim in the state court. The doctrine of exhaustion of state remedies has been violated in this case. 28 U.S.C. §2254(b); *Picard* v. *Connor*, 404 U.S. 270 (1971).

II.

Assuming, *arguendo*, that the First Circuit could properly consider a facial vagueness claim, that Court wrongly decided the issue. The subject matter of the statute is uniquely narrow, namely, actual flags of the United States.

Additionally, culpable intent has to be proven to establish a violation of the statute. These factors, taken together with accepted rules of statutory construction and analagous Massachusetts cases, give adequate notice of what the statute proscribes.

III.

A. Massachusetts' interest in flag legislation is real, multi-faceted and difficult to capture in a short formula. The First Circuit erred in constricting and equating that interest to a promotion of loyalty and patriotism.

Because Massachusetts has a valid interest in comprehensive flag legislation, ch. 264 §5 does not abridge free speech on its face. Depending upon the coalescence of a number of variable facts, conduct impinging upon the physical integrity of the flag can bring the First Amendment into play. Since the statute reaches only intentional acts that affect the physical integrity of United States flags it is not overbroad on its face.

B. There is no recognizable communicative element in appellee's conduct that would bring the First Amendment into play. Assuming that the appellee was attempting to convey an idea, the statute is constitutional since it meets the four criteria set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Appellee's wearing of the flag on his buttocks is conduct within the statutory proscription.

Argument

I. In the Circumstances of this Case the First Circuit Court Erred in Finding Mass. Gen. Laws, Ch. 264 §5 Unconstitutionally Vague on its Face.

A. *The Case in the Supreme Judicial Court of Massachusetts.*

The appeal to the Supreme Judicial Court in this case was made by way of a bill of exceptions, a process gov-

erned by Mass. Gen. Laws, ch. 278 §31.[1] Pages one through seven of the Appendix reproduce the amended bill of exceptions that was entered in the Supreme Judicial Court. This was the entire appellate record before the Court.

The term "vague" appears but *once* in the *record* on appeal to the Supreme Judicial Court, to wit:

> "The [appellee] filed a Motion to Dismiss the Complaint on the ground that G.L. c. 264 §5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I Article 12 of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials." (App. 1).

At first glance, it might appear that appellee intended to include in his argument to the Supreme Judicial Court that the statute was vague on its face. But a review of appellee's brief, filed in support of his amended bill of exceptions, reveals no such argument.

In his "statement of the case" appellee set forth the language quoted immediately above (App. 8). Thereafter, in his "summary of argument", he stated:

> "General Laws ch. 264 §5 violates on its face the due process clause of the Fourteenth Amendment in that

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[1] Mass. Gen. Laws, ch. 278 §31 provides in relevant part: "Exceptions may be alleged by a defendant in a criminal case who is aggrieved by an opinion, ruling, direction or judgment of the superior court rendered upon any question of law arising at the trial of such case. . . . The exceptions shall be reduced to writing and filed with the clerk. . . . The clerk . . . shall present them to the court, and if, upon examination thereof by the presiding justice, they are found conformable to the truth, they shall be allowed by him."

it is overly broad and brings within its ambit constitutionally protected activity." (App. 11).

When he arrived at this issue in the body of his argument, he framed it in these terms:

> "B. General Laws Ch. 264 §5 On Its Face Violates The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution In That It Is Overly Broad." (App. 19).

The six pages of argument that follow the "Fourteenth Amendment issue" do not address themselves to aspects of vagueness, but rather discuss speech, both pure and symbolic, and its relationship to the First Amendment (App. 19-26 and cases cited therein). The section contains neither a discussion of adequate notice to prospective offenders, nor a discussion of the statute's alleged lack of sufficient guidelines for law enforcement authorities, fact-finders and reviewing courts. Although the appellee introduced this section of his brief with a reference to the Fourteenth Amendment, the argument and cases cited in support of the argument are clearly directed to the First Amendment and overbreadth.

The opinion of the Supreme Judicial Court evidences that it did not analyze the statute in light of a facial vagueness challenge:

> "Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." (App. 37).

This holding is in obvious harmony with Supreme Judicial Court Rule 1:13 which reads:

> "No oral argument shall be heard, except by special permission of the court, in behalf of a party for whom no brief has been filed as provided in these rules. *The court need not pass upon questions or issues not argued in briefs.* Nothing argued in a brief shall be deemed to be waived by a failure to argue orally." (Emphasis supplied).

The Court frequently resorts to this rule when an issue is not fully argued in a protagonist's brief. *Commonwealth* v. *Roberts,* 1972 Mass. Adv. Sh. 1477, 1487-88, 285 N.E.2d 919, 926 (1972); *Lindahl* v. *Sullivan,* 1972 Mass. Adv. Sh. 645, 281 N.E.2d 231, 232 (1972); *Blais* v. *Quincy Mutual Fire Ins. Co.,* 1972 Mass. Adv. Sh. 195, 196, 278 N.E.2d 746, 747 (1972); *Commonwealth* v. *White,* 358 Mass. 488, 492, 265 N.E.2d 473, 475 (1970); *Commonwealth* v. *Wilson,* 355 Mass. 441, 443, 245 N.E.2d 439, 440 (1969). An advocate has to do more than just state the issue in his brief; he must argue it. *Blais* v. *Quincy Mutual Fire Ins. Co., supra* at 645, 278 N.E.2d at 747. Moreover, when an issue is not fully briefed, the Court will treat the issue as *waived* even though the issue may be based upon "constitutional considerations." *Commonwealth* v. *Roberts, supra* at 1487-88, 285 N.E.2d at 926 (alleged denial of equal protection of the laws); *Commonwealth* v. *White, supra* at 492, 265 N.E.2d at 475 (allegation of double jeopardy). Thus, the First Circuit's conclusion (Jur. St. 24) that the Supreme Judicial Court "assume[d that] there was no vagueness [in the statute] as applied to appellee is inaccurate. The Supreme Judicial Court decided the case at it was pressed by the appellee. Appellee argued that the statute proscribed conduct protected by the First Amendment. Most of the rescript opinion is directed to First Amendment considerations (App. 37). Whatever the appellee had in mind as to Fourteenth Amendment vagueness totally blurred into First Amendment overbreadth in his brief.

The Supreme Judicial Court did apply the terms of the statute to appellee's conduct and found no vagueness. Since the appellee did not articulate or develop an argument regarding facial vagueness the Court did not reach that issue.

B. *The Case in the United States District Court and the First Circuit Court of Appeals.*

The amended bill of exceptions and the briefs of the parties to the Supreme Judicial Court were submitted to the United States District Court pursuant to its order that the parties designate "all papers and proceedings in the state court" that the parties deemed relevant (App. 45-46). The state court briefs were submitted in addition to the state court record to enable the federal courts not only to have the undisputed facts but also to see what questions of law appellee had argued from those facts. *Cf. Picard* v. *Connor,* 404 U.S. 270 (1971).

An examination of the state court record and briefs reveals that the appellee never developed an argument that the flag statute was vague on its face when measured against the due process clause of the Fourteenth Amendment. It is submitted, then, that the First Circuit Court erred in reaching a facial vagueness challenge in the circumstances of this case since the appellee never pressed that issue in the Supreme Judicial Court. Delicate federal-state relations are certainly subject to an unnecessary strain if a state court is denied the initial opportunity to construe the enactments of its legislature in the light of a *specific* constitutional challenge. Nothing in the record before the First Circuit Court indicated "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. §2254(b).

The construction and interpretation of state statutes

are exclusively state court functions. See, *e.g. Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163-164 (1943); *Younger* v. *Harris*, 401 U.S. 37, 52 (1971). This exclusive function should not easily be usurped by a federal court especially in the circumstances of a federal habeas corpus petition where 28 U.S.C. 2254(b) has full application. The doctrine of exhaustion of state remedies does apply to the question of whether a state prisoner has completed both an "as applied" and a "facial" challenge to his conviction under a state statute. *Wilson* v. *Gooding*, 303 F. Supp. 952, 953 (N.D. Ga. 1969), *aff.* 431 F.2d 855, 856 (5th Cir. 1970), *aff. sub. nom. Gooding* v. *Wilson*, 405 U.S. 518 (1972).

It is submitted that the First Circuit Court impermissibly extended the scope of review in a federal habeas corpus proceeding. In reaching an analysis of whether the flag statute was vague *on its face*, the First Circuit apparently concluded that the failure of the Supreme Judicial Court to conduct a like analysis was "plain error." It is, of course, the federal rule that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). But this rule has no application in the context of a federal habeas corpus proceeding.

> "The whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Townsend* v. *Sain*, 372 U.S. 293, 311 (1963).

Certainly, no particular form of words or phrases is essential to raise a constitutional issue in a state court. However some recognizable standard is required. A constitutional issue should be presented to a state court with

fair precision. This minimum standard was not met in this case as to the facial vagueness of the statute.

In addition to the applicability of the doctrine of exhaustion of state remedies, appellant urged the First Circuit Court not to undertake a facial vagueness analysis of the statute because of the principle expressed in *United States* v. *Raines*, 362 U.S. 17, 21 (1960):

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

The First Circuit found that two of the exceptions to the *Raines* principle applied in the instant case (Jur. St. 25):

> "Thus, where a statute has already been declared unconstitutional in a large number of its intended applications, and it appears that it was not intended to stand as valid in the few remaining fortuitous situations to which it might apply, *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); or where a state court has declared valid one provision or application of a statute which is inextricably tied up with an invalid one, *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) — in such circumstances the broad constitutional challenge may be mounted." (footnote omitted).

It is difficult to fathom how these two exceptions apply to this case. Even assuming that the First Circuit was correct in the amazing way it read these exceptions,[2] they simply do not apply to the Massachusetts flag statute.

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[2] The First Circuit said (Jur. St. 25): "We read these exceptions as not depending upon the historic fortuity that a statute has already been subject to such holdings but as depending upon the probability of such holdings invited by the wording of the statute."

It is clear that the Massachusetts statute divides easily into two parts. The first twenty-six words are directed toward flag desecration; the remainder of the statute deals with commercial exploitation of the flag. There is near unanimous agreement that the states have a legitimate interest in enacting legislation to prevent commercial exploitation of the flag. Moreover, most legal authorities agree that narrowly-drawn legislation aimed at protecting the physical integrity of the flag is valid. In citing the *Butts* exception, the First Circuit seems to be saying that when the Massachusetts legislature enacted the statute in 1899, its basic intent was to penalize words about or gestures towards the flag rather than acts that impinge upon the flag's physical integrity. This rather gratuitous conclusion is not supported by either a fair reading of the statute or the history of the statute's application in Massachusetts from 1899 to the present date.

Nor does the *Dorchy* exception apply here. If the Massachusetts Supreme Judicial Court found itself faced with a case where the facts presented could not fairly be construed as contemptuous treatment of the flag, the Court could issue restrictive guidelines[3] as to the application of the statutory language or could excise[4] the offending language from the statute.

Neither *Butts* nor *Dorchy* reached this Court by way of appealed federal habeas corpus proceedings. Thus, the more relevant question in this case is not whether the *Raines'* principle or the *Raines'* exceptions apply, but

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[3] See discussion *infra*, page 21, as to cases where the Supreme Judicial Court of Massachusetts has placed restrictive guidelines on statutory language.

[4] Federal courts have had little difficulty in finding that portions of state flag statutes were severable. *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 748 (S.D. Ill. 1971); *Hodson* v. *Buckson*, 310 F. Supp. 528, 533 (D. Del. 1970), *rev. on other grounds sub nom. Hodson* v. *Stabler*, 444 F.2d 533 (3rd Cir. 1971).

whether the First Circuit Court violated the delicate federal-state comity policies underlying the federal habeas corpus statute. It is submitted that said policies have been clearly violated.

II. The Statute Is Not Vague On Its Face.

Assuming, *arguendo*, that the First Circuit could properly analyze Mass. Gen. Laws, ch. 264, §5 against an allegation of facial vagueness, it is submitted that the Court wrongly decided that issue.

The First Circuit, in finding the Massachusetts statute vague on its face, relied heavily upon three recent decisions of this Court both as to appellee's standing[5] to challenge the statue on its face (Jur. St. 26-27) and as to the legal principles applicable (Jur. St. 28). *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), involved a vagrancy ordinance; *Colten* v. *Kentucky*, 407 U.S. 104 (1972), addressed itself to a subdivision of the state's disorderly conduct statute; and *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), dealt with an antinoise ordinance. The *subject matter* covered by each of these statutes is by its very nature both broad and indefinite. However, application of the subject matter of the statute to a "particular context" can do much to eliminate claims of facial vagueness.

> "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, gen-

[5] Appellant relies upon the argument set forth at pages 8-13 of this brief as to why the issue is more properly designated as appellee's failure to exhaust state remedies (i.e., failure to present the issue to the Supreme Judicial Court) than as a question of appellee's standing to raise facial vagueness.

> eral "breach of the peace" ordinance, but a *statute written specifically for the school context*, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." (footnote omitted). *Grayned* v. *City of Rockford, supra,* at 112. (Emphasis supplied).

The Rockford antinoise ordinance was upheld. The Jacksonville vagrancy ordinance did not withstand constitutional scrutiny. Of course it was impossible to put the Jacksonville ordinance into a "particular context". Mr. Justice Frankfurter's dissent in *Winters* v. *New York*, 333 U.S. 507 (1948) is apposite (at p. 540):

> "Only a word needs to be said regarding *Lanzetta* v. *New Jersey*, 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particlar offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in *by the text of the statute or by the subject matter* so as to give notice of conduct to be avoided." (Emphasis supplied).

Certainly, the subject matter of ch. 264 §5 is much narrower than that involved in either *Papachristou, Colten* or *Grayned*. Because the subject matter of the statute is the flag of the United States and the flag of Massachusetts, it is clear that the conduct the statute proscribes must al-

ways necessarily occur in a "particlar context" — i.e., conduct that is intimately related to either the American or state flag. As in *Grayned, supra,* at 112, we are not dealing with a vague "breach of the peace" statute, but with a statute proscribing certain conduct that touches a readily identifiable, physical object.[6]

That readily identifiable, physical object, insofar as the anti-desecration words of the statute have application, is an actual flag of the United States or of Massachusetts. The phrase "any representation [of the flag]"[7] does not appear in the anti-desecration section of the statute but only in those sections directed towards commercial misuse. Since the anti-desecration words of the statute apply only to actual American and Massachusetts state flags fair notice is given of what the statute proscribes. The Massachusetts statute does not address itself to emblems, buttons or devices that might be said to be *similar* to the flag. Compare *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344, 350 (2nd Cir. 1970), *appeal docketed sub nom. Cahn* v. *Long Island Vietnam Moratorium Comm.,* No. 70-102, March 24, 1971; *Hoffman* v. *United States,* 445 F.2d 226 (D.C. Cir. 1971). Moreover, the Massachusetts statute does not attempt to expropriate the colors and design of the flag by expanding the flag

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[6] Although the First Circuit at one point in its analysis (Jur. St. 37) recognized the specific and unique subject matter of the statute, it did not relate this recognition to a solution of "vagueness-notice" problems apparently because it felt that nearly all conduct involving the flag was closely akin to pure speech (Jur. St. 37-40 and footnote 18).

[7] Appellee, in his brief to the Supreme Judicial Court, stated that the Massachusetts legislature, by the Acts of 1971, Chapter 74, amended the statute by inserting the phrase "or any representation thereof." (App. 27). This is not accurate. It appears that the phrase "any representation thereof" has been in the statute since its original enactment in 1899. The Acts of 1971 Ch. 74 amendment in fact modified the first sentence by inserting the phrase "burns or otherwise" after the second word of the sentence and further amended the statute by increasing the fine to "not less than one hundred dollars."

definition to include "standard, colors, ensign, or any picture or representation of either, or of any part or parts of either . . . ." 18 U.S.C. §700(b). Compare *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D. N.Caro. 1971); *Thoms* v. *Heffernan*, 473 F.2d 478 (2nd Cir. 1973), *petition for cert. filed sub nom. Heffernan* v. *Thoms*, No. 72-1359, April 9, 1973; *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 742 (S.D. Ill. 1971); *Long Island Vietnam Moratorium Comm.* v. *Cahn*, *supra*, at 345; *Crosson* v. *Silver*, 319 F. Supp. 1084, 1089 (D. Ariz. 1970).

Not only does a prospective offender have to engage in conduct that impinges upon the physical integrity of an actual flag in order to violate the statutory mandate, but he must also be shown to have *intended* to violate the statute. The citations in the Supreme Judicial Court opinion on the issue of "intent" make this point quite clear (App. 38). Of course, the "requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952) (footnote omitted). Inadvertent or careless conduct touching the flag is not proscribed by the statute unless conduct of that sort is so egregious as to rise to a level of willful neglect. See *Boyce Motor Lines, Inc.* v. *United States*, *supra*, at 342.

The First Circuit did not address itself to the element of "intent" though it cannot be gainsaid that this element is directly relevant to "vagueness-notice" problems.

> "The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on

> trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. [citation omitted]. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States,* 325 U.S. 91, 101-102 (1945).

Why the First Circuit did not mention the narrow subject matter of the Massachusetts statute or the necessity of proving "intent" is unknown. But in reading the opinion one gets the unmistakable impression that since the First Amendment overbreadth conclusions were to be so expansive, the Fourteenth Amendment vagueness discussion would necessarily have the flavor of a bootstrap analysis.

In addition to the narrow subject matter of the statute and the necessity of proving culpable intent, other means show how to "extrapolate its allowable meaning . . . ." *Garner* v. *Louisiana,* 368 U.S. 157, 174 (1961) (Frankfurter, J., concurring).

> Here, we are "relegated . . . to the words of the ordinance itself," to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford,* 408 U.S., *supra,* at 110. (footnotes omitted).

The First Circuit found the statutory words "treats contemptuously" to be impermissibly vague (Jur. St. 33). Certainly that phrase is not as specific as "mutilates, tramples upon [or] defaces" — the words preceding "treats contemptuously." But that fact alone is no reason why ordinary principles of statutory construction must be eschewed.

The following principle of statutory interpretation was pressed upon First Circuit by the appellant (without success): when general and specific words are associated with each other, they take "color" from each other such that the more general words are restricted to a sense analogous to the more specific. 2 Sutherland, Statutory Construction §4909 (3rd rev. ed. Horack 1943). The Supreme Court of New Hampshire had no difficulty in applying this principle to the phrase "cast contempt" in its flag statute such that the Court concluded that the phrase was limited to acts of physical desecration similar to those previously enumerated in the statute. *State* v. *Royal*, — N.H. —, 305 A.2d 676, 679 (May 31, 1973). This same principle of statutory interpretation has long been recognized and applied in the courts of Massachusetts. *Koller* v. *Duggan*, 346 Mass. 270, 191 N.E.2d 475 (1963); *Hodgerney* v. *Baker*, 324 Mass. 703, 88 N.E.2d 625 (1949); *Meunier's Case*, 319 Mass. 421, 66 N.E.2d 198 (1946); *Kenney* v. *Building Commissioner of Melrose*, 315 Mass. 291, 82 N.E.2d 683 (1944).

When the Supreme Judicial Court of Massachusetts has been presented with facial vagueness challenges to analogous state statutes, it has made careful analyses in order to protect constitutional rights. If the allegedly vague statutory language did not easily lend itself to a restrictive interpretation, the statute was declared unconstitutional. Thus in *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N.E.2d 666 (1950), a loitering statute was found to be unconstitutionally vague. The Court was faced with

vagueness challenges to five different statutes in *Alegata* v. *Commonwealth*, 353 Mass. 287, 231 N.E.2d 201 (1967). Four of the statutes were declared void. However, the "disorderly conduct" statute was upheld. The Court construed the statutory language narrowly and gave "disorderly conduct" the same meaning as given to that concept by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition was obviously not available to the legislature when the statute was enacted in 1943.

In *Thomes* v. *Commonwealth*, 355 Mass. 203, 243 N.E.2d 821 (1969), the Court upheld the "definiteness" of the phrase "common night walkers" by construing it to apply only to persons abroad at night soliciting people to have illicit sexual intercourse. And in *Commonwealth* v. *Jarrett*, 1971 Mass. Adv. Sh. 833, 269 N.E.2d 657 (1971), the Court found that the "disturbers of the peace" statute passed constitutional muster. In construing the statute the Court stated (at 840, 269 N.E.2d at 662):

> "The mere making of statements, or expressing of views or opinions, no matter how unpopular, or views with which persons present to not agree, has never been and is not now punishable as a disturbance of the peace under the law of the Commonwealth."

See also *Commonwealth* v. *Brasher*, 1971 Mass. Adv. Sh. 907, 270 N.E.2d 389 (1971), regarding the "stubborn child" statute. It is submitted that since the Supreme Judicial Court has shown itself ready to analyze state statutes when faced with arguments of facial vagueness in the cases just cited, the reason no such analysis exists in this case is because the appellee failed to make such an argument.[8]

The written interpretations given to the flag statute

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[8] See argument *supra* at pages 8-11.

by Massachusetts law enforcement authorities over the years have not specifically dealt with the initial anti-desecration section of the statute. 4 Opinions of Att. Gen. 470-473 (1915); Report of Att. Gen., Pub. Doc. No. 12 (1968) 192-193.[9] However, both of these opinions illustrate that the highest police authority in the Commonwealth has shown himself ready to interpret this penal statute narrowly as state law requires (Jur. St. 54 and case cited).

It is submitted that since the subject matter of the statute is inherently narrow, since it is necessary to prove culpable intent to establish a violation of the statute, and, since there are several other indicia in Massachusetts law evidencing a specific meaning to the statute for those people who desire to obey it [*Colten* v. *Kentucky*, 407 U.S., *supra*, at 110], the statute is not impermissibly vague. To paraphrase *Grayned, supra* at 113: the vagueness of the phrase "treats contemptuously" is dispelled by the statute's requirements that (1) the contemptuous treatment of the United States flag be direct and immediate; (2) that the contemptuous treatment actually impinge upon the physical integrity of the flag; and (3) that the act be wilfully done.

III. The Statute Is Not Overbroad Either On Its Face or as Applied to Appellee.

A. *The Statute on Its Face.*

The Supreme Judicial Court rejected appellee's argument that the statute acted as a restraint upon the right to freedom of speech either on its face or as applied to

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[9] The 1915 opinion is reproduced as an appendix to this brief for the convenience of the Court, pages 30-33. The 1968 opinion can be found reproduced in the Jurisdictional Statement at pages 53-55.

him (App. 37). The First Circuit found the statute to be facially overbroad (Jur. St. 48).

If one accepts the First Circuit's unique starting point, the remainder of its analysis follows logically. That starting point can be summarized as follows: "[T]he flag [of the United States] has a meaning — a very special meaning — historically associated with support of our form of government and its majestic presence." (Jur. St. 37); it "... speak[s] by itself as a symbol of the United States of America ...." (Jur. St. 37); it is "[s]uch a primary symbol .... [that] any individualized activity with regard to it ... is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.'" (Jur. St. 38). The fatal flaw in this reasoning is the attempt to circumscribe the "very special meaning" of the flag. Undoubtedly the flag is a symbol of the United States. And in many instances the use of the flag is associated with governmental authority on both the federal and states levels. And the flag can represent our democratic form of government and everything associated with that government since 1776. But all of these concepts come no where near exhausting the meaning of the flag or explaining what is encompassed by the phrase "United States of America." In truth the flag has millions of meanings — as many meanings and nuances as rational beings are capable of appreciating.

Appellant submits that the First Circuit's definition of the meaning of the flag is so truncated that the Court in effect wiped out any legitimate state interest in flag legislation *a priori*. By assimilating the symbolic content of the flag to mean the "... promotion of loyalty and patriotism" (Jur. St. 41) the First Circuit set up a straw man and then found that the straw man could offer no legitimate reason for flag legislation.

Courts that have upheld the constitutionality of state flag legislation have found several valid state interests:

(1) its interest in the preservation of the flag as a symbol of unity on national ideals and purpose. *Sutherland* v. *DeWulf, supra* at 744;

(2) its interest in the preservation[10] of the public peace. *Ibid.; State* v. *Royal,* — N.H. —, 305 A. 2d, *supra* at 680; and

(3) its interest in protecting the physical integrity of the flag. *Ibid.*

None of these formulations really gets at the essence of the states' interest in flag legislation. The flag of the United States is *sui generis* as is any other distinctive flag. Hence, any formulation of the states' interest is going to be difficult to verbalize. It is submitted, though, that the following quotation from *Parker* v. *Morgan,* 322 F. Supp. 585 (W.D. No. Caro. 1971) best captures the states' interest (at 588):

> "We reject plaintiff's argument that because the national flag is a symbol it is always "saying" something, and because it says something control of its display and usage is outlawed by the freedom of speech clause of the First Amendment. The argument is based on a false premise: that what the flag stands for can be authoritatively stated, i.e., that it represents government and/or official policy. If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant view-points of a Dr.

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[10] Appellant recognizes that the states' interest in the *preservation* of the public peace is less substantial than their interest in preventing imminent breaches of the peace. An undifferentiated fear of a disturbance is not a sufficient state interest, standing alone, to justify restrictions on First Amendment rights. *Cohen* v. *California,* 403 U.S. 15, 23 (1971). However, it is submitted that in the area of flag desecration, the states' interest in the preservation of the public peace amounts to more than an undifferentiated fear. *Halter* v. *Nebraska,* 205 U.S. 34, 41 (1907) (*dictum*).

Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.

The flag has never been a trademark of government. It is not "official" in the sense that its display is limited to the Army or the Navy or to public buildings of for state occasions. It no more belongs to the President than it does to the most private citizen. It may be flown, and often is, over the YMCA and the Jewish synagogue, the Peace Corps and the Army post, the American Federation of Labor and General Motors. It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America — in all its marvelous diversity."

There is no evidence in the record before this Court, nor is there any historical evidence, that the Massachusetts legislature enacted the statute in order to restrict the exercise of First Amendent rights. It does not appear that in 1899 anybody was claiming to be exercising First Amendment rights by desecrating the United States flag. The motivation of the Massachusetts legislature, therefore, is not suspet. Compare *O'Brien* v. *United States*, 376 F.2d 538, 540-541 (1st Cir. 1967), *judgment vacated sub nom. United States* v. *O'Brien*, 391 U.S. 367 (1968).

If this Court agrees that the states have a legitimate and cogent interest in passing flag legislation then it follows that the Massachusetts statute "... no more abridges free speech *on its face* than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." *United States* v. *O'Brien*, 391 U.S. 367, 375 (1968) (emphasis supplied).

Appellant submits that the First Circuit is wrong in holding that all intentional conduct that amounts to a desecration of the flag is necessarily expressive of some idea that is protected by the First Amendment (Jur. St. 38, 41-42). Using a flag as a picnic blanket [*State* v. *Bunch*, 26 Ohio Misc. 164, 54 Ohio Ops.2d 354, 268 N.E.2d 831 (1970)] or as a car seat cover [*State* v. *Sinniger*, 486 P.2d 1303 (Ct. of App., Ore. 1971)] does not express any idea—symbolically or otherwise.

Courts and commentators have recognized that an act of flag desecration *may be* expressive of a particular idea *depending* upon a number of variables—the specific location where the act occurred, the immediate political climate, or the intent of the actor—to name but a few. *Parker* v. *Morgan, supra*, at 588; *United States* v. *Crosson*, 462 F.2d 96, 102 (9th Cir. 1972), *cert. den. sub nom. Crosson* v. *United States*, 409 U.S. 1064 (1972); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 862 (1971); T. Emerson, The System of Freedom of Expression 87 (Vintage Ed. 1971). This recognition is of recent origin, paralleling the development of the concept of "symbolic speech". Fifteen years ago appellee's overbreadth contentions would have received short shrift in any court of law. This fact supports appellant's argument that the Massachusetts statute was not and is not now directed at the suppression of ideas. It is only when an indefinite number of variables are carefully interwoven in a given context that First Amendment considerations arguably come into play.

The Massachusetts interest in its flag legislation could probably be seen more clearly upon a slightly different and less emotional set of facts—e.g., if appellee had been wearing a Massachusetts state flag, or a Polish flag, or a Nigerian flag, or a Canadian flag, etc.[11] Few people

[11] In 1912 the Massachusetts legislature enacted a foreign flag statute which has remained unchanged to the present date. Now

would argue that the state does not have a valid interest in preventing public acts of desecration of such flags. Fewer people would argue that the state was attempting to promote loyalty and patriotism for Poland, Nigeria, Canada, etc. Massachusetts' comprehensive flag legislation is not aimed at eliciting affirmative acts of respect or at "promoting patriotism" (Jur. St. 41) but rather at preventing public acts of desecration that readily evoke violence. See *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907). Speech, pure or otherwise, is not intrinsically wedded to the acts ch. 264 §5 proscribes. To hold that the statute, on its face, infringes upon First Amendment rights is to read the Amendment to mean that any action, no matter how destructive, is privileged so long as the actor asserts that he was conveying an idea. See, *Street* v. *New York*, 394 U.S. 579, 616-617 (1969) (Fortas, J., dissenting).

Moreover, the statute in no way deprives anyone from using the flag in public. The Supreme Judicial Court has indicated that speech, no matter how contrary or defiant, is not proscribed by the statute (App. 37). Protesters of all political persuasions are free to make use of the flag in their demonstrations. The statute reaches only intentional acts that affect the physical integrity of United States flags.[12]

The statute is not overbroad on its face.

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codified as Mass. Gen. Laws, ch. 264 §7 it reads: "Foreign flags; misuse; penalty — Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag or emblem of a foreign country at peace with the United States, whether such flag or emblem is public or private property, or whoever displays such flag or emblem or any representation thereof upon which are words, figures, advertisements or designs, shall be punished by a fine of not less than five nor more than fifty dollars."

[12] That the statute is directed only at *actual* flags of the United States was further clarified by a recent admendment. The Acts of 1971, ch. 655 (approved August 12, 1971) added the following at the end of the statute: "For the purposes of this section the term 'flag of the United States' shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force."

B. *The Statute As Applied To Appellee.*

Appellee was convicted of treating the United States flag contemptuously because of his act of wearing a cloth flag on the seat of his trousers. Through his counsel, appellee contended in the Supreme Judicial Court that the conduct he engaged in should be classified as "symbolic speech" (App. 13).[13] However, nothing in the record before this Court indicates that the question of "symbolic speech" was, "... in the first instance, determined as a factual matter by the trial court. Further, there is no indication that ... [appellee] either presented evidence on this question at trial or urged any standard at trial for determining this issue." *Cowgill* v. *California*, 396 U.S. 371, 372 (Harlan, J., concurring in dismissal).

The record in this case does not disclose a "communicative element" other than the allegations of appellee's counsel. Absent a clear communicative aspect to appellee's conduct, First Amendment considerations do not apply. See *United States* v. *O'Brien, supra*, at 376.

Even if it be assumed that appellee was engaging in speech it is submitted that the quadripartite test set forth in *O'Brien* (at 377) has been met in this case. Apparently only the First Circuit contends that the states cannot enact narrowly-drawn flag desecration statutes. The discussion at pages 22 through 25 of this brief sets forth Massachusetts' strong and legitimate interest in flag legislation and shows that this interest is not aimed at the suppression of speech. A host of other indicia evidence that any incidental restriction ch. 264 §5 may have on alleged First Amendment freedoms will indeed be minimal. The Supreme Judicial Court has construed the statute such that it does

[13] It should be noted that appellee's counsel is not entirely sure what "idea" appellee was allegedly conveying by his conduct (Brief to Supreme Judicial Court, App. 13).

not apply to pure speech directed at the flag (App. 37) nor to inadvertent or careless acts that touch the flag (Ap. 38). The subject matter of the statute, being restricted to *actual flags and flags alone,* is narrower than any other flag statute presently in effect in the United States. A fair reading of the statute and supportive Massachusetts case law show that the acts proscribed are those that impinge upon the physical integrity of the flag. Wearing a flag on one's derriere is conduct within the statutory proscription; application of statute to the appellee did not violate his First Amendment rights.

Conclusion

For all of the foregoing reasons, the appellant respectfully requests this Court to reverse the judgment of the court below.

Dated: Boston, Massachusetts, July 19, 1973.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
DAVID A. MILLS
Assistant Attorney General
Chief, Criminal Appellate Section
Criminal Division
CHARLES E. CHASE
Assistant Attorney General

WILLIAM T. BUCKLEY
District Attorney
Middle District
Commonwealth of Massachusetts

APPENDIX

OPINION OF THE ATTORNEY GENERAL

4 Opinions of Att. Gen. 470-473 (August 6, 1915)

To the Chief of the Massachusetts District Police:

I acknowledge your letter requesting my opinion as to whether certain pictures submitted to me by you are in violation of R. L., c. 206, § 5, as amended by St. 1913, c. 464, and St. 1914, c. 570. That statute is as follows:—

> Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or who shall in this commonwealth expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag, shall be punished by a fine of not less than ten nor more than one hundred dollars; but a flag which belongs to a grand army post, to a camp of the legion of Spanish war veterans or which is the property of or is used in the service of the United States or of this commonwealth may have the names of battles and the name and number of the organization to which such flag belongs inscribed thereon. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, the flag or any representation thereof in such manner that the flag or its representation is used to

attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this act be deemed to be upon the flag.

The purpose of this statute, as declared in the title of the act of 1913, is "to prohibit the misuse of the national and the state flags." It should be interpreted in the light of this purpose with a view to increase respect for our flags and, if possible, not in such a manner as to restrict the proper use of the flags or to reduce the statute to an absurdity. It apparently seeks to prohibit three things, namely, first, insults to the flags; second, their use as a part of any form of advertising, and third, the engraving or printing of a representation of the United States flag upon any article of merchandise or any wrapper or receptacle of articles.

Acts coming within the first prohibition are readily recognized. The extent of the prohibition of the use of the flags for advertising purposes is indicated with reasonable plainness by the last sentence of the statute, added by the amendment of 1914. The chief difficulty comes in applying the third prohibition. It forbids the exhibition, manufacture, sale, exposure for sale, gift or possession for any purpose of "any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag." The broad term "any article or substance" is somewhat limited by the words immediately following, "being an article of merchandise or a receptacle of merchandise or articles." In a broad sense, however, a card or a sheet of paper upon which a picture of a flag has been printed, or a piece of cloth upon which the colors constituting it have been stamped, is an article of merchandise. Obviously, it would seem that the Legislature never intended to use the language of this statute in any such broad sense. Such an interpretation would

make it a criminal offence to possess or to display not only any picture of the flag whatever, but even the flag itself in many of its cheaper and more common forms. Such an interpretation would prohibit the use, not merely the misuse, of the flag, and would reduce the statute to a manifest absurdity. Thus interpreted the statute would probably be void as an unreasonable police regulation.

In my opinion the clause under discussion must be read together with the preceding clause forbidding the use of the flag for advertising purposes, and is to be considered merely as an extension of that prohibition. It should be interpreted merely as forbidding the engraving or printing of the flag, whether for advertising or decorative purposes, upon wrappers or receptacles, or upon articles, which are themselves complete articles of merchandise aside from the presence of a representation of the flag upon them. Thus an article of which the representation of the flag is an inherent part, which could not be the complete article intended without the representation of the flag, and to which the representation of the flag is not a mere ornamental and unessential addition, does not, in my opinion, come within the prohibition of the statute. Unless such an article violates some other portion of the statute its possession or use is not forbidden.

It follows that a picture or printed representation of the flag alone, or a picture containing it as a *bona fide* part of the picture, as, for example, displayed upon a building, is not a violation of this statute when engraved or printed upon a card or in or upon a book, paper or magazine, provided such picture is not used or intended to attract attention to or advertise such book, paper, magazine or card or its contents, or any other thing or matter. Accordingly, I advise you that the picture post-cards submitted by you to me, one bearing merely a representation of the flag entitled "Old Glory," and the

others being pictures of actual buildings upon which one or more flags are displayed, as they do not appear to be used for any advertising purpose, are not in violation of law.

The use of pictures containing representations of the flag upon the covers of books, papers or magazines will often present a question of some difficulty. Such pictures, so used, do not necessarily come within the third prohibition of the statute as interpreted by me. Thus they do not violate its terms unless they are used or intended for advertising as defined in the statute. If such a picture is used or intended solely for artistic or ornamental purposes, and is in no way used or intended to attract attention to the book, paper or magazine or its contents as it is offered for sale, there is, in my opinion, no violation of the law. If, however, any part of the use or purpose of such a cover is to attract attention to and advertise the publication or its contents, the second prohibition of the statute has been violated. Each case must stand by itself.

With reference to the cover of the Boston Sunday Post Magazine of July 4, 1915, submitted to me, it is my opinion that it was not a violation of law. Though its date indicates that it was intended to give a patriotic flavor to the publication, there is, in fact, no representation of the United States flag printed upon it. Red and white stripes with no field of blue or stars cannot be said to be such a representation when it is not obvious that it is intended to depict a portion of the flag. The cap represented on this cover may have been made of any piece of goods colored as indicated. It is the flag itself, not the colors that compose it, that the statute is devised to protect.